In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 395

THE UNITED STATES OF AMERICA, PLAINTIFF IN error

v.

SOLOMON NOVECK

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF THE UNITED STATES

OPINION OF THE COURT BELOW

The opinion of the District Court for the Southern District of New York from which this case comes has not been reported. It will be found at page 6 of the record.

JURISDICTION

The judgment to be reviewed was entered April 16, 1926 (R. 7). The writ of error was sued out May 6, 1926 (R. 9, 1), under the Criminal Appeals Act of March 2, 1907 (c. 2564, 34 Stat. 1246). The

District Court granted a motion in arrest of judgment and to vacate sentence theretofore imposed upon defendant in error, holding that the statute under which the indictment was found had been repealed.

QUESTION PRESENTED

Does Section 253 of the Revenue Act of 1918, which makes it an offense to wilfully attempt to evade a tax or to fail to make a return, repeal, as to false tax returns, Section 125 of the Penal Code, which defines the crime of perjury?

The court below held that it does. The Government claims this holding is erroneous.

STATEMENT

Defendant in error was indicted in the Southern District of New York for the crime of perjury committed in violation of Section 125 of the Penal Code, the indictment being in two counts (R. 1). A judgment of the District Court sustaining a plea in bar to the first count on the ground of the statute of limitations was affirmed by this Court in *United States* v. *Noveck*, 271 U. S. 201. The case at bar involves the second count of the indictment, which charged perjury in connection with the 1920 income tax return of Solomon Noveck & Company, a corporation of which defendant in error was president and in which he owned 98 per cent of the stock (R. 3).

Defendant in error pleaded guilty under Count two of the indictment and was sentenced to imprisonment for four months and to the payment of a fine of $2,000. (R. 5.) Later the Circuit Court of Appeals for the Second Circuit decided in the case of *Steinberg* v. *United States* (opinion not reported, but set forth in the appendix hereto) that Section 253 of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 268) repealed Section 125 of the Penal Code in so far as indictments for perjury in tax returns made under the Revenue Act of 1921 were concerned. Whereupon defendant in error in the instant case moved the District Court to arrest the judgment. (R. 6.) The District Court, upon the authority of the *Steinberg case*, held that Section 253 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1085), under which the return in the instant case was made, being identical with the same section of the Revenue Act of 1921, repealed Section 125 of the Penal Code in so far as indictments for perjury in tax returns under the Revenue Act of 1918 are concerned. (R. 6.) The District Court accordingly entered orders (R. 7) arresting judgment and vacating sentence. Since the docketing of the instant case in this Court the Circuit Court of Appeals for the Second Circuit, upon a rehearing, reversed its position on the above question in the *Steinberg case* (14 F. (2d) 564), but it then seemed beyond the power of the District Court to reverse itself in this case.

STATUTES INVOLVED

Section 125 of the Penal Code provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

Section 253 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1085) provides:

> That any individual, corporation, or partnership required under this title to pay or collect any tax, to make a return or to supply information, who fails to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, shall be liable to a penalty of not more than $1,000. Any individual, corporation, or partnership, or any officer or employee of any corporation or member or employee of a partnership, who willfully refuses to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, or who willfully attempts in any manner to defeat or evade the tax im-

posed by this title, shall be guilty of a misdemeanor and shall be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred in holding that Section 253 of the Revenue Act of 1918, in so far as indictments for perjury in tax returns are concerned, repealed Section 125 of the Penal Code, and erred in arresting the judgment and vacating the sentence.

SUMMARY OF ARGUMENT

That Section 253 of the Revenue Act of 1918 does not repeal *pro tanto* Section 125 of the Penal Code is shown not only on reason and authority, but upon examination of the legislative history of the criminal provisions of the old internal revenue laws. As a matter of fact, the situation presented by Section 253 of the said Act and Section 125 of the Penal Code is nothing more nor less than the familiar case of two penal statutes having elements in common or relating to the same transaction but each of which provides for a different crime involving elements not found in the other. *Morgan* v. *Devine*, 237 U. S. 632. This was the view reached upon rehearing in *Steinberg* v. *United States*, 14 F. (2d) 564, upon the opinion in which case before rehearing the District Court based its ruling in the instant case. The

same result also was reached in *Levin* v. *United States*, 5 F. (2d) 598; certiorari denied, 269 U. S. 562.

ARGUMENT

I

ON REASON AND AUTHORITY IT IS CLEAR THAT SECTION 253 OF THE REVENUE ACT OF 1918 DOES NOT REPEAL PRO TANTO SECTION 125 OF THE PENAL CODE

That the court below erred in holding that, in so far as perjury in tax returns is concerned, Section 253 of the Revenue Act of 1918, *supra*, repealed Section 125 of the Penal Code, *supra*, is readily demonstrable. There is no express repeal, nor may repeal be fairly implied.

The well-settled rule that repeals by implication are not favored applies nowhere with greater force than in internal revenue laws. *Fabbri* v. *Murphy*, 95 U. S. 191, 196. It is a very common thing for cumulative remedies or penalties to be provided in laws concerning the revenue and its collection (*The Distilled Spirits*, 11 Wall. 356), and as stated by Mr. Justice Story as early as 1842, in *Wood* v. *United States*, 16 Pet. 341, 363—

> The more natural, if not the necessary, inference in all such cases is that the legislature intend the new laws to be auxiliary to, and in aid of the purposes of, the old law, even when some of the cases provided for may equally be within the reach of each. There, certainly, under such circumstances,

> ought to be a manifest and total repugnancy in the provisions, to lead to the conclusion that the latter laws abrogated, and were designed to abrogate the former.

As late as 1912, in *United States* v. *Barnes*, 222 U. S. 513, 520, this Court quoted with approval the above language of Mr. Justice Story.

There may be instances, of course, of an implied repeal where a later statute covers the *whole subject* of an earlier one; but this is only true where the later statute completely displaces the earlier and leaves nothing upon which it may operate. The rule is succinctly stated in *Frost* v. *Wenie*, 157 U. S. 46, 58, as follows:

> It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute.

There is no such supersedure here. Rather is there presented the precise situation as that found in *Washington* v. *Miller*, 235 U. S. 422, and *Kennedy* v. *United States*, 265 U. S. 344, in that both

statutes can be given operation without conflict. It is nothing more than the familiar case of two penal statutes having an element in common or relating to the same transaction, but each of which provides for a different crime, involving elements not found in the other. The case falls squarely within the rule, frequently announced by this Court, that two offenses are distinct if each requires proof of a fact which the other does not. *Morgan* v. *Devine*, 237 U. S. 632; *Ebeling* v. *Morgan*, Id. 625; *Gavieres* v. *United States*, 220 U. S. 338; and *Burton* v. *United States*, 202 U. S. 344.

In *Morgan* v. *Devine, supra*, this Court held that two offenses growing out of the same transaction may be committed and separately punished—the one under Section 192 of the Penal Code, breaking into a post office, and the other under Section 190 of the Penal Code, stealing property belonging to the Post Office Department.

In *Gavieres* v. *United States, supra*, defendant used calumnious language in a public place. He was prosecuted once for insulting and outraging the public official to whom he addressed his remarks, and a second time for behaving in an indecent manner in a public place. This Court found an element in each offense not appearing in the other and sustained the double punishment.

The same conclusion is reached in *Levin* v. *United States*, 5 F. (2d) 598; certiorari denied, 269 U. S. 562, with respect to the very sections of

law under consideration in the instant case. That it is correct there can be no question.

Cases like *Schroeder* v. *United States*, 7 F. (2d) 60, *Schechter* v. *United States*, 7 F. (2d) 881, and *Rouda* v. *United States*, 10 F. (2d) 916, are not in point. The count charging possession of liquor in each of these cases could not support a separate punishment for, of necessity, the acts set out in the other counts, the transportation in the first, the maintenance of a nuisance in the second, and the manufacture of liquor in the third, required possession. As a consequence, that count did not contain an element not found in the others. The situation here is different.

It is not necessary, in order to prove perjury under Section 125 of the Penal Code, to show as an element of that offense any attempt to use the affidavit. The offense is complete when the oath is taken. Thus in *Noah* v. *United States* (C. C. A. 9th), 128 Fed. 270, involving a pension affidavit, it was held that perjury is committed by falsely swearing to a written instrument even if the instrument is never in fact filed or used. In *United States* v. *Rhodes*, 30 Fed. 431, in applying that portion of Section 5438 of the Revised Statutes (now Section 35 of the Penal Code) that makes it a crime to make a fraudulent or fictitious affidavit, it was held not necessary to prove its use. See also *United States* v. *Lawrence*, 26 Fed. Cas. No. 15572; *United States* v. *Volz*, 28 Fed. Cas. No. 16627;

Berry v. *United States*, 259 Fed. 203; *Commonwealth* v. *Carel*, 105 Mass. 582; 2 Bish. Cr. Law (9th Ed.), Secs. 1028 and 1055. On the other hand, to prove an attempt to defeat or evade taxes under Section 253 of the Revenue Act of 1918 it is not necessary to show that the tax return had been in fact verified under oath. It was so decided in *Emmich* v. *United States*, 298 Fed. 5; certiorari denied, 266 U. S. 608. And also, unlike in perjury, unless the affidavit—in this case the return—is actually filed or used, there is no attempt at the evasion of the law. *United States* v. *Rachmil*, 270 Fed. 869.

The Federal criminal law commonly makes provision for the prosecution both of perjury and the filing of the false affidavit. In *United States* v. *Davis*, 231 U. S. 183, it was held a violation of Section 28 of the Penal Code to transmit or present to the Government a false affidavit under the homestead laws; and in *United States* v. *Smull*, 236 U. S. 405, it was held perjury to take a false oath under those laws. In *Edgington* v. *United States*, 164 U. S. 361, it was held a violation of R. S. 5438 (now Section 35 of the Penal Code) to file a false affidavit under the pension laws; and in *Markham* v. *United States*, 160 U. S. 319, a conviction under the special perjury provisions in those same laws was upheld. *United States* v. *Bartow* (2 cases), 10 Fed. 873; Id. 874, sustained an indictment for taking a false oath in a report to the Comptroller of the Currency under the national banking laws,

and a second indictment for making a false entry in the same report and filing it. Such instances might be multiplied.

Since, as we have shown, the two offenses contain elements uncommon to each other it is obvious, under the rule in *Morgan* v. *Devine*, 237 U. S. 632, that effect may be given both Section 253 of the Revenue Act of 1918 and Section 125 of the Penal Code without conflict. Accordingly, under the rule of *Frost* v. *Wenie*, 157 U. S. 46, there can be no room for the application of the doctrine of implied repeal.

Such was the result reached upon rehearing on this point in *Steinberg* v. *United States*, 14 F. (2d) 564 (C. C. A. 2d), with respect to Section 125 of the Penal Code and Section 253 of the Revenue Act of 1921. The original ruling of the *Steinberg case* holding that there was a repeal is the authority upon which the District Court bases its holding in the instant case with respect to Section 253 of the Revenue Act of 1918, said section being identical in both revenue acts.

II

THE LEGISLATIVE HISTORY OF THE CRIMINAL PROVISIONS OF THE INTERNAL REVENUE LAWS DISCLOSES THAT CONGRESS INTENDED TO CREATE BOTH THE CRIME OF PERJURY AND THE CRIME OF FILING A FALSE INCOME TAX RETURN

If, in the face of the foregoing, further confirmation is needed to show that Congress did not intend

by Section 253 of the Revenue Act of 1918 to repeal *pro tanto* Section 125 of the Penal Code, it is to be found in the legislative history of the criminal provisions of the internal revenue laws.

Although it does not mark the beginning of the practice, to go no further back than the Revenue Act of July 1, 1862, (c. 119, 12 Stat. 432), declared by one author (Bender's War Revenue Law, 1914, p. XVII) to be the "basis of all later legislation on the subject" of internal revenue, it will be seen that Congress has consistently treated perjury in connection with a tax return as a separate and additional offense to that of filing a false return. That Act contained not only a specific provision, Section 9 (p. 435), making the filing of a false return an offense, but also, in Section 32 (p. 444), a specific provision for perjury. This policy Congress continued in Sections 15 and 42 [1] of the Revenue Act of June 30, 1864 (c. 173, 13 Stat. 223, 227, 239), as well as in Sections 11 and 37 of the Revenue Act of July 14, 1870 (c. 255, 16 Stat. 256, 259, 260). Therefore we find that there were prosecutions under the provisions of these old statutes both for perjury in a tax return and for filing false returns. *United States* v. *Rumsey* (1867), 27 Fed. Cas. No. 16,207; *United States* v. *Smith* (1870), 27 Fed. Cas. No. 16,341.

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[1] Section 42 was amended by Section 60 of the Revenue Act of 1866 (ch. 184, 14 Stat. 98, 168) in a minor particular not pertinent here.

So the law remained until the revision of 1872. In their notes on the revision of the general perjury provisions (Sec. 18, Act of April 30, 1790, c. 9, 1 Stat. 112, 116, and Section 13, Act of March 3, 1825, c. 65, 4 Stat. 115, 118) the Commissioners to revise the Statutes listed twenty acts, each of which included specific provisions for perjury and false swearing (Revision of the United States Statutes, Vol. 2, p. 2582). Among these they listed Section 42 of the Revenue Act of 1864, *supra*. Then followed this note:

> The crime of perjury and false swearing occupies a conspicuous place in the laws of the United States, as the foregoing list of acts abundantly shows. The list might be doubled. The legislative practice is to affix the pains and penalties of perjury anew every time an oath is required in any statute, to be taken before either a judicial or administrative officer. It would be well if this growing mass of laws in regard to perjury were no further enlarged. To this end the cited sections of the Acts of 1790 and 1825 are so revised and slightly altered as to embrace, it is believed, every case of false swearing, whether in a court of justice or before any administrative officer of the Government. For fear, however, that Sections 73 and 74 [the sections referred to above] may not be broad enough to cover every perjury and subornation of perjury, it is recommended that the two following sections, in

> brackets and italicized, be adopted in lieu thereof. We feel much confidence that no case can occur which these provisions will not reach.

The revision recommended by the Commissioners was adopted verbatim by Congress as Section 5392 of the Revised Statutes. Accordingly, Section 42, as it stood in the Act of June 30, 1864, was omitted. Section 5392 of the Revised Statutes afterwards became, with a minor unimportant change, Section 125 of the Penal Code.

No conclusion adverse to the contention that Section 42 of the Act of 1864 was carried over into the general provision of Section 5392 R. S. can be deduced from the continuation of the amendment to Section 42 in the Act of 1866 (without the original section) as the special provisions of Section 3158 of the Revised Statutes. Whatever adverse inference could otherwise be drawn from the inclusion of the amendment only in the Revised Statutes must fall in the face of the specific reference made by the Commissioners to the original section in reserving the general perjury provision.

Section 15 of the Act of June 30, 1864 (filing false returns), was carried into the Revised Statutes as Section 3179. It is still in force as noted by the editors of Compiled Statutes (6 Comp. Stat., Sec. 5901) and Federal Statutes Annotated (3 Fed. Stat. Ann., 2d Ed., p. 1009).

Obviously it was not intended that the Revised Statutes should disturb the well-established policy

of treating perjury in a tax return as an offense additional to that of filing a false return. The old specific provision for perjury was simply embodied in a general provision of the penal laws, where it logically belongs.[2] Speaking of the Revised Statutes, in *United States* v. *Sischo*, 262 U. S. 165, this Court said (p. 168):

> That volume was primarily a codification of the general statutes then in force and is

[2] Like the Revenue Act of 1864, the Act of March 3, 1857 (c. 116, 11 Stat. 250) contained, in Section 5 thereof relating to the public lands, a specific provision for perjury. As in the case of the corresponding provision (Section 42) of the Revenue Act, *supra*, the Commissioners for the revision of the statutes referred to this special provision for perjury as one they sought to embody in the general provision of Section 5392 of the Revised Statutes. In *United States* v. *Smull*, 236 U. S. 405, after a reference to the Commissioners' notes, it was held that Section 125 of the Penal Code (formerly Section 5392 of Revised Statutes) continued the provision formerly embodied in Section 5 of the Act of March 3, 1857. In *United States* v. *Davis*, 231 U. S. 183, it had been held that Section 28 of the Penal Code covers the filing of a false affidavit under the homestead laws in much the same way as the specific provision of Section 253 of the Revenue Act of 1918 covers the revenue laws. Before the Revision of 1872, the Act of March 3, 1823 (c. 38, 3 Stat. 771), from which Section 28 of the Penal Code was derived, punished the filing of a false affidavit. *United States* v. *Davis*, *supra*, p. 189. That provision of the Act of 1823 was analogous to the provision (Section 15) of the Revenue Act of 1864, the predecessor of Section 253 of the Revenue Act of 1918. Consequently the *Smull case*, *supra*, in holding that the special perjury provision (Section 5) of the 1857 Act continues in effect under the general perjury provision of Section 125 of the Penal Code, practically rules on a situation identical with that presented in the case at bar.

not lightly to be read as making a change, although of course it may do so.

Accordingly, even after the Revision it was recognized that the general perjury provisions of Section 5392 of the Revised Statutes (now Sec. 125 of the Penal Code), like the old specific perjury provision of the 1864 Act, covered perjury in the field of the internal revenue. *Ralph* v. *United States* (1881), 9 Fed. 693; *United States* v. *Hardison* (1905), 135 Fed. 419. Writing in 1895 Carrington, in "The Income Tax Law of August 24, 1894" (p. 66), listed Section 5392 of the Revised Statutes as one of the sections of the Revised Statutes generally applicable to that law. The same view was taken in 1899 with respect to the Revenue Act of 1898 by Ash in "The United States Internal Revenue Laws Now in Force" (pp. 491 and 522), and again in 1914 by "Bender's War Revenue Law, 1914" (p. XXVIII).

Nor is there anything in the history of the development of the provisions of Section 3179 of the Revised Statutes (filing false returns) into Section 253 of the Revenue Act of 1918 to warrant the conclusion that Section 125 of the Penal Code (formerly 5392 of the Revised Statutes) is not still applicable to perjury in a tax return.

Section 3179 continued unimpaired until the War Revenue Act of 1898 (c. 448, 30 Stat. 448). Incorporated as Section 23 (p. 457) of that Act was a provision against filing false returns modeled on Section 3179 of the Revised Statutes. The prac-

tice thus initiated—it also had been the practice before the enactment of the Revised Statutes—was followed in each title of subsequent revenue acts. Two such provisions, Sections 35 and 38, were contained in the Corporation Excise Act of 1909 (c. 6, 36 Stat. 11, 111, 117). One was contained, Section II A, Subdivision 2 F, in the income tax provisions of the Tariff and Revenue Act of October 3, 1913 (c. 16, 38 Stat. 114, 171). The Revenue Act of 1916 (c. 463, 39 Stat. 756) carried five special provisions against false returns, viz: Section 18 (p. 775), income tax; Section 210 (p. 780), estate tax; Section 310 (p. 782), munition tax; Section 402 (f) (p. 787), liquor taxes; and Section 408 (p. 792), other special taxes. The Revenue Act of 1917 (c. 63, 40 Stat. 300), in Section 1209 (p. 336), amended Section 18 of the 1916 Act (income tax) in a minor particular, and incorporated, Section 1004 (p. 325), a general provision covering the same ground, applicable to all the taxes carried by the Act. This general provision made the first notable departure from the form of Section 3179 of the Revised Statutes in that, after prohibiting the making of "any false or fraudulent return" (the same language of Section 3179) it also punished "whoever evades or attempts to evade any tax" imposed by the Act. This modification the Revenue Act of 1918 (c. 18, 40 Stat. 1057), both in Section 253 (p. 1085), relating to income taxes, and in Section 1308 (b) (p. 1143), relating generally to other taxes, adopted and further enlarged to in-

clude an attempt at the evasion of the tax "in any manner." This enlargement eliminated the necessity of the specific provision against filing "any false and fraudulent return," which was accordingly dropped.

The same provisions were made in the Revenue Act of 1921 (c. 136, 42 Stat. 227), in Section 253 (p. 268) relating to income taxes, and in Section 1302 (p. 309) relating to other taxes. This process of consolidation of the provisions against false returns, begun in the Revenue Act of 1918, was completed by the Revenue Act of 1924. (C. 234, 43 Stat. 253.) That eliminated Section 253 and carried but a single general provision, Section 1017 (p. 343), applicable to all taxes covered by the Act. The Revenue Act of 1926 (c. 27, 44 Stat. 9) continued this policy in Section 1114 (p. 116). Thus the provision prohibiting false returns has returned to its condition in the Revised Statutes, and there is now but a single provision covering all classes of taxes.

While the above-enumerated sections of subsequent revenue acts, by making more particular provision against false returns than Section 3179 of the Revised Statutes, undoubtedly repealed that section *pro tanto,* as noted by the editors of Compiled Statutes (6 Comp. Stat., sec. 5901), and Federal Statutes Annotated (3 Fed. Stat. Ann., 2d Ed., p. 1009), it would seem clear that they effected no further repeal. If, as heretofore shown, it was recognized that Congress did not intend Section

3179 of the Revised Statutes to change the policy of long standing, of treating perjury in a tax return as an offense additional to that of filing a false return, then manifestly the acts modeled on that section did not carry that intent. Accordingly, we find that, despite Section 253 of the Revenue Act of 1918 and like sections of earlier and later acts, the courts still recognize that the general perjury provisions, now 125 of the Penal Code, apply to the crime of perjury in a tax return. *United States* v. *Noveck* (1926), 271 U. S. 201; *Levin* v. *United States* (1925), 5 F. (2d) 598; certiorari denied, 269 U. S. 562; and *United States* v. *Benowitz* (1919), 262 Fed. 223.

This should be sufficient to dispose of any argument as to repeal. As stated by this Court in *United States* v. *Rabinowich*, 238 U. S. 78, 88, there should be "attributed to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different."

III

THE QUESTION IN ISSUE IS NOT AFFECTED BY THE FACT THAT UNDER SECTION 125 OF THE PENAL CODE PERJURY IS A FELONY, WHILE UNDER SECTION 253 OF THE REVENUE ACT OF 1918 FILING A FALSE RETURN IS ONLY A MISDEMEANOR, ALTHOUGH PERJURY MAY BE INCLUDED IN THE COMMISSION OF THE LATTER OFFENSE

It does not impair the Government's position that under Section 125 of the Penal Code perjury

is a felony, while under Section 253 of the Revenue Act of 1918 the filing of the false return is only a misdemeanor. The same situation was presented by the original Revenue Act of 1864, which carried provision for both perjury and filing a false return.

This point was ruled upon in *United States* v. *Lawrence*, 26 Fed. Cas. No. 15572, a case arising under the customs laws. In that case the defendant was charged with forging a writing used in entering goods at the customs. The charge was brought under Section 5418 of the Revised Statutes, the predecessor of Section 28 of the Penal Code. This section of the Revised Statutes made such forgery a felony. Another statute (Section 5445 R. S.) made all acts committed in effecting a false entry of goods a misdemeanor. Accordingly, it was urged upon the court that to hold that the forgery came under the general provisions of Section 5418 would result in an absurdity, because—"while the completed transaction is punished as a misdemeanor, part of it may be selected out and be punished as a felony." The court answered thus:

> * * * it is plain that an act which, under some circumstances, may be an element of a transaction also punishable as a substantial offense, may, by itself, be an offense when made such by a statute. It would hardly be supposed that a defense to an indictment for forgery would be made out by showing that

> the forged paper was used to extort money, although, in such case, an indictment would lie for the misdemeanor as well as for the felony; and no absurdity arises although the punishment attached to the felony be greater than that prescribed for the misdemeanor.

The Government recognizes that the practice of pyramiding penalties in what is, in common thought, a single offense is subject to criticism. It is arguable, as suggested in Bishop on Criminal Law (9th Ed.), Vol. 1, Sec. 1062, ~~and~~ that it offends the spirit of the Fifth Amendment to divide a single transaction into several offenses ~~that~~ and impose a punishment on each. For a time some of the courts so held. See *Halligan* v. *Wayne*, 179 Fed. 112, and *Munson* v. *McClaughry*, 198 Fed. 72. These cases were disapproved in *Morgan* v. *Devine*, 237 U. S. 632.

The multiplication of crimes is not peculiar to this country. England faced the same problem and solved it by an enactment in 1889 (52 and 53 Viet. c. 63). Until Congress sees fit to enact a similar measure it is submitted that, in this case at least, in view of the clear intention of Congress to continue in force and effect the perjury provisions of Section 125 of the Penal Code, in addition to the offense of filing a false return, under the provisions of Section 253 of the Revenue Act of 1918, it is not open to the courts to hold that prosecution will not lie under both sections.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the District Court erred in holding that in so far as the offense of perjury in connection with tax returns is concerned Section 253 of the Revenue Act of 1918 repealed Section 125 of the Penal Code. The judgment should be reversed and the case remanded to the District Court for appropriate proceedings.

WILLIAM D. MITCHELL,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
SEWALL KEY,
Attorney.

DECEMBER, 1926.

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Before Hon. CHARLES M. HOUGH, Hon. MARTIN T. MANTON, Hon. LEARNED HAND, Circuit Judges

CHARLES J. STEINBERG, PLAINTIFF IN ERROR

v.

UNITED STATES OF AMERICA, DEFENDANT IN ERROR

Writ of error to judgment of conviction entered in the District Court for the Southern District of New York

The indictment in six counts alleged:

Count 1: That Steinberg did wilfully, etc., refuse to pay income tax due by him on March 15, 1921.

Count 2: That he did the same thing on March 15, 1922.

Count 3: That on March 15, 1921, Steinberg unlawfully, wilfully, &c. "did attempt to defeat and evade" the income tax then due by him, and that such attempt to defeat and evade the same was wrought "by means of the same incorrect, false and fraudulent income tax return for the calendar year 1920," which, as the count sets forth at length, Steinberg prepared and filed.

Count 4 asserts that Steinberg on March 15, 1922 was an individual required to pay an income tax, and that he did file at that time "a false and fraudulent income tax return for the calendar year

1921"; the count then charges the method of its falsity and fraudulence in great detail, and concludes that "by means of the said inaccurate, false and fraudulent income tax return for the calendar year 1921" Steinberg attempted "to defeat and evade the income tax" imposed by law.

Counts 5 and 6 are for perjury under Crim. Code 125, Count 5 for having sworn to the income tax return for 1920, and Count 6 for having done the same thing as to the return for 1921, each return being the same referred to in Counts 3 and 4 respectively.

Thus Counts 1, 3 and 5 rest upon the failure of Steinberg to state in his sworn income tax return for the year 1920, the truth regarding his income for that year; and Counts 2, 4 and 6 similarly rest upon his failure to do the same thing with regard to his income for 1921.

At the opening of trial the Court sustained demurrers to Counts 1 and 2 and then proceeded to "sever" the indictment by declining to take up for trial Counts 3 and 5. Steinberg was then tried upon Counts 4 and 6, and the evidence shows that his wrong-doing was said to consist in having during the year 1921 obtained profits or gains from the sale of liquor in violation of the National Prohibition Act, and then returning as his sole income his salary as an officer of a certain corporation. That salary was about $10,000, but the fourth count charged that

> in truth and in fact the net income (of Steinberg) for the calendar year 1921, was a certain sum, to wit: the sum of $760,635.43.

And further charged, in substance, that by failing to return the income and returning the smaller sum,

Steinberg had attempted to evade the payment of income tax upon the unreturned residue, *i. e.*, the sum of $490,646.61.

This count (4) rests upon Sec. 253 of the Tax Law of 1921 (42 Stat., 268), which provides:

> Any individual * * * who wilfully refuses * * * to make such return * * * or who wilfully attempts in any manner to defeat or evade the tax imposed by this title, shall be guilty of a misdemeanor and shall be fined not more than $10,000 or imprisoned for not more than one year or both, together with the costs of prosecution.

The return alluded to is provided for by Sec. 227 of the Statute (42 Stat., 250), which declares that individuals (such as Steinberg)

> "shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this" statute.

Crim. Cod. Sec. 125, declares:

> Whoever, having taken an oath * * * in any case in which the law of the United States authorizes an oath to be administered * * * that any * * * declaration, deposition or certificate by him subscribed is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury and shall be fined not more than $2,000 and imprisoned not more than five years.

This offense under Sec. 335 is a felony.

Plaintiff in error was convicted on both counts and sentenced on the fourth count to one year's imprisonment and a fine of $10,000, and upon the

6th count was sentenced to imprisonment for four years, the same to begin at the expiration of the said sentence for one year. Thereupon this writ was taken.

Robert W. Elder and Otho S. Bowling for plaintiff in error.

David P. Siegel and William D. Whitney, Assistant U. S. Attorneys, opposed.

HOUGH, C. J.

Of the evidence herein it is enough to say that there was testimony that Steinberg had said that during 1921 he did acquire more money by dealing in illicit liquor than the amount which he reported as his income for that year; but there was no evidence sufficient to go to the jury tending to show that he had received any particular or specified number of dollars as such gains. As for the charge that during the year 1921 his "net income * * * was a certain amount, to wit the sum of $760,635.43,"—had the indictment been a complaint for that sum, plaintiff ought to have been nonsuited.

For discussion of the legal point to be next stated, we shall assume that the foregoing was not a variance, and that the amount (if material) having been laid with a videlicet, proof of any substantial excess over his reported income was sufficient; although the practice of exciting if not inflaming jurymen by parading visions of money enormously in excess of anything capable of legal proof cannot be approved. Juries are not ordinarily acquainted with the technical virtues of "to wit."

The legal point is that such unlawful gains as the evidence tended to show Steinberg receiving

are not "income" within the meaning of the act of 1921.

That the winnings of a professional gambler, the loot of a burglar, the bribes of a dishonest official, the wages of a prostitute or the profits of any criminal commerce should not be regarded as income, but should for reasons of public policy be regarded as beneath the contempt of the law, is a proposition not without attraction.

If they constitute income within the meaning of the law it must follow that in the language of Sec. 214 of the Act, the "net" or taxable portion thereof must be reached by deducting "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business"; wherefore whoever for profit maintains a saloon, brothel or "fence" would have good right to claim as lawful deductions those bribes for "protection" which are a notorious part of the profitable exercise of such vocations. The moral degradation arising from endeavor by law to collect a necessarily lawful tax out of occupations by equal necessity unlawful, corrupting and immoral, may well give one pause.

It is true that a distinction may be drawn between the profits of an embezzlement, a robbery or burglary (*Rau* vs. *United States* 260 F., 136), and those of sales of liquor, or plumes from birds of paradise, both of which are at present under rather similar bans, but there remains a long list of unlawful and profitable occupations in which the proprietor has that legal title to his illegal profits which the thief has not.

But these considerations of civic morals, however potent they should be in the legislature or with prosecuting officers who are required to choose and

not abuse their weapons against crime, the Courts are bound to administer the law as it is found, regardless of considerations of morals, policy or taste, suitable for the legislative or executive branches. Our duty and our only power is to ascertain what the legislature means by what it has said, and then enforce what was said.

It is unfortunate that even in briefs and at bar the phrase "income tax" is continually used as though under a statute imposing a tax even called by that name, nothing but what lexicographers mean by the word can be taxed. This is an assumption fundamentally erroneous, for it disregards the legislative power of definition.

If the state has authority to tax, regulate or prohibit something described in ordinary language and not by some term of technical art, the same authority may define, i. e. delimit or extend the meaning of that which is to be taxed or regulated. Of this the all sufficient instance at the present is the phrase "intoxicating liquors"; the key words of the 18th Constitutional amendment. The power of Congress to define or extend (it makes no difference which) the meaning of that phrase so as to cover beverages confessedly not intoxicating is too well known to require comment. If Congress can lawfully make and enforce a definition which is an admitted falsehood, as it now does, it can assuredly extend the meaning of the word "income" to cover items beyond the definition of any dictionary.

This has been done by Section 213 (42 Stat., 238), which declares that "gross income" shall include "gains, profits, and income derived from * * * professions, vocations, trades, businesses, commerce or sales * * * or the transaction of any busi-

ness carried on for gain or profit, or gains or profits and income derived from any source whatever."

On the face of this statute, which in defining "gross income" extends the phrase to cover "gains and profits" as contradistinguished from income, we have no doubt that Congress meant to levy a contribution upon every species of gain no matter how immoral or vicious the method of acquiring the same might be.

That a given sinner or criminal must in the pursuit of his or her prohibited vocation break many laws to obtain the wherewithal to satisfy the taxing law, must be regarded as immaterial, for the whole matter is covered by one remark of Holmes, J., in *United States* v. *Stafoff*, 260 U. S., 477: "*Of course* Congress may tax what it also forbids." This is compendious enough, and was said about liquor; and equally is it of course that if the legislature can tax the liquor which it forbids, it can also tax the gains made by dealing in that which is forbidden. We are not concerned with how these singular results are to be obtained; for it is further of course that he who makes unlawful gains cannot lawfully be required to divulge how he made them. This difficulty is so obvious that it must have been considered even by the lawmakers.

It hardly needs mention, that the record before us, common knowledge of prosecuting methods and the comment of the Court in sentencing this man, clearly show that Steinberg was indicted not to enforce a revenue law nor penalize him for failing to comply with one, but to punish severely for dealing *largely* in liquor. As we pointed out in *Vanatta* v. *United States*, 289 F., 424, the prohibi-

tion statute makes no difference between the sale, possession or transportation of a bottle of liquor, and the same acts in relation to a shipload; wherefore as Congress has furnished weapons appropriate for frontal attack only against small fry, endeavor is made to net the larger fish in the meshes of revenue, customs and tax laws, with the ever useful conspiracy statute in reserve for a plurality of wrongdoers. The question is not whether this is wise or politic, fair or in good taste, but whether it can legally be done. We think it can under the language of the statutes, and know that similar things have been done for generations.

In *Hartford* v. *United States*, 2 Cr., 109, it was held proper to punish a man for not procuring a permit to bring into the country what the Embargo prohibited him from bringing in at all.

Marks v. *United States*, 260 F., 313, is one of many reported instances of indictments for manufacturing smoking opium without license and bond, long after all such opium was absolutely forbidden.

The so-called Harrison Act, upheld in *United States* v. *Doremus*, 249 U. S. 86, though now doubted in *United States* v. *Daugherty*, 46 S. C. Rep. 155, furnishes a perfect example of deliberate legislative invention of a pretended revenue law for the purpose of enforcing moral ideas. This is going much further than attempting to use old statutes for the indirect invigoration of new ones. The action of Congress after *United States* v. *Yuginovich*, 256 U. S., 450, and the treatment thereof in *Stafoff* v. *United States* (*supra*) is illuminating as to legislative leanings, and judicial treatment thereof.

Thus we hold that the unknown increment above the sum reported for 1921 as Steinberg's income, was taxable, and he was punishable for concealing the facts under Section 253 of the statute.

The only counts on which plaintiff-in-error was tried (4th and 6th) bear a resemblance and relation to each other, which must be emphasized. The fourth is for violation of Sec. 253, which makes it a crime to "attempt in any manner to defeat or evade the tax imposed", and the pleader assigns as the means of such attempted evasion, and the only means, Steinberg's "inaccurate, false and fraudulent" tax return. Inaccurate may be disregarded, if that adjective stood alone it would be insufficient, and what made the return fraudulent also renders it false, *i. e.* the false oath. Result is that Steinberg was charged with avoiding a tax in one certain specified way, and then in another count with creating or making that way.

It is not necessary to enquire whether sentencing on both these counts is not within our rulings in *Schroeder* v. *United States*, 7 F. (2d) 60 *Harrison* v. *United States*, 7 F. (2d) 259 and *Schechter* v. *United States*, 7 F. (2d) 821; although it is certainly hard to deny that *as* pleaded the proof of one count proves an essential or necessary ingredient of the other; and the rule is that "when two offenses are so related as to have an essential ingredient common to both and the proof of one involves the establishment of the other," *autrefois acquit* or *convict* would be a good plea if the counts were separate indictments (*State* v. *Magone*, 33 Or., 570, and cases cited), and that furnishes conclusive argument against double sentence.

We call attention to this because of the vigorous efforts now making by multiplying counts for alleged separate offences, to reach an aggregate severity of punishment satisfactory to zealous prosecutors under unsatisfactory statutes.

But our *holding* is that the Income Tax Act of 1921 by Sec. 253 has so far as indictments for perjury in tax returns under the statute are concerned repealed Sec. 125 Crim. Code.

It is another example of each department wanting its own little code. Section 125 is undoubtedly broad enough to cover a false oath made in a certificate (return) required by law; the section was R. S. 5392, and that came from earlier and not much changed acts which were applied to a case of false swearing to an income tax return under the Act of 1864. (*United States* v. *Smith*, 1 Saw., 277, C. F. 16341).

The various Income Tax laws passed since the 16th Constitutional Amendment, patterned what was Sec. 253 in 1922 after the model of 1864 until 1918; the characteristic thing about all of them being that specific punishment was allotted to the making of "*any false and fraudulent* return or statement (of income) with intent to defeat or evade."

The acts of 1918 and 1921, perhaps amplify but certainly simplify this language, by saying that whoever defeats or evades "*in any manner*" is guilty. The phrase italicized undoubtedly includes a false and fraudulent manner; and if that falsity consisted in a false oath (required on a material matter) Sec. 253 prescribed a penalty for that particular perjury.

The result is just that pointed out recently in *Curione* v. *United States* (C. C. A. 2d, Mar. 26,

1926); the 6th count cannot stand; and the judgment thereunder must be reversed.

We have considered *Levin* v. *United States,* 5 F. (2d) 598; we understand the decision to be that making under oath a false income tax return and filing the same, is one crime and swearing to the same return is another. To this we cannot agree, but the point on which we rest decision, *i. e.* the repeal *quoad* evasions of tax by returns falsely sworn to, of Sec. 125 by Sec. 253 Tax Law, was not argued. The question at bar was avoided by jury action in *Emmich* v. *United States,* 298 F., 5. That there may be means of evading tax without perjury we can easily conceive, in fact the *Emmich case* is an example.

Hammer v. *United States,* 6 F. (2d) 786, holds that the subornation of perjury statute (Crim. Cod., Sec. 126) may be invoked against one who procures the false swearing to be performed under circumstances covered by Bankruptcy Act Sec. 29b; for the later statute merely fixed punishment for perjury in bankruptcy. The decision is not here relevant.

The foregoing would leave standing the separate sentence imposed under the fourth count, but we are further of opinion that evidence was wrongfully admitted prejudicial to the accused.

The fundamental object of the prosecution was to show that Steinberg during 1921 received income, *i. e.* made gains from liquor sales.

Presumably to that end there was admitted in evidence a photostat of some or all (we cannot be sure which) of the pages of an account or memorandum book, found by a visitor to Steinberg's office during the latter's absence, behind a row of

books standing in a bookcase. The original book is not in evidence, it is not in Steinberg's handwriting, and the contents of the photostat pages plus the comment of the man who abstracted the original and the men who examined the copies, do not in our judgment furnish evidence tending to prove that Steinberg during the year in question received any income or gains. But the book was most injurious, because (if for no other reason) some entries suggested that bribes had been paid to Prohibition or "Revenue" officials. No legal question will be served by dwelling on this document (Ex. 9); under the circumstances we think it was serious error to admit it, because it was not probative and was inflammatory.

The only other point on which we now express opinion is that the joinder of counts for misdemeanors with counts for felonies is now permitted; the objection to the practice because of the differing *grades* of crime is antiquated. We agree with *Phillips* v. *United States*, 264 F., 657.

Judgment reversed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES J. STEINBERG, PLAINTIFF-IN-ERROR

against

UNITED STATES OF AMERICA, DEFENDANT-IN-ERROR

MANTON, Circuit Judge (Concurring).

I concur in the reversal of the judgment of conviction below for the several errors pointed out in the prevailing opinion. But I also think that the

judgment should be reversed with directions to dismiss the indictment because no breach of the perjury statute is established. The income or gains as to which it is said the plaintiff-in-error failed to report and therefore perjured himself, came from the sale of diverted whiskey obtained by the Cardo Company and sales of diverted alcohol obtained by the Reliance Company and fees for bribing enforcement officials. If he had returns from any or all of these sources, was it gains, profit or income withing the taxing statute? Section 213 of the Revenue Act of 1921 provides for taxing gains, profits and income derived from any source received. Income within the meaning of the Act "Includes gains, profits and income derived from salaries, wages or compensation for personal services * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property whether real or personal, growing out of the ownership or use of an interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." It means "the gain derived from capital, from labor, or from both combined." *Eisner* v. *Macomber*, 252 U. S. 189. Did Congress intend anything other than legitimate labor as opposed to criminal effort in labor in imposing a tax from which it was to secure revenue to pay the obligations of the Government? No property right exists in whiskey that might be termed capital (Title 2, Sec. 25). Reasonable doubt as to what constitutes income must be re-

solved against the government. *United States* v. *Merriam,* 263 U. S. 179.

The law requires a return under oath by the taxpayer (Sec. 137, 42 Sts. 250). The taxpayer must keep a record and render, under oath, his statement and return and comply with such regulations as the Commissioner, with the approval of the Secretary of the Treasury, may from time to time prescribe. Act of 1921, Sec. 1310, 42 Stat. 308. The Commissioner may examine under oath any person rendering a return (Act of 1918, Sec. 1305, 40 Stat. 1140). In the case of criminal gains, a taxpayer may refuse to incriminate himself and the government is powerless in securing the detailed information of his return. For the Fifth Amendment of the Constitution means that a person shall not be compelled when acting as a witness in any investigation, to give testimony that might tend to show that he had committed a crime. *Counselman* v. *Hitchcock,* 142 U. S. 547. The protection of the Fifth Amendment is not confined to criminal causes but extends to any investigation by an administrative officer. *Arndstein* v. *McCarthy,* 254 U. S. 71; *Interstate Commerce Commission* v. *Branson,* 154 U. S. 447; *Internal Revenue Agent* v. *Sullivan,* 287 F. 138. It is not possible that Congress intended to grant the right of examining the sources from which the income came so as to make an investigation regarding it—with knowledge that the taxpayer would be justified under the Fifth Amendment in refusing to give testimony at such investigation because what he might say would tend to incriminate him. Nor could Congress expect him to keep a record so that he might make returns and which record might in

time be used to incriminate him. Criminal practices should always be punished and immunity should not be granted to the criminal in return for the government obtaining a share of his profits in criminal operations through the medium of income tax payments. If the recipient of this kind of income is obliged to make known its amount and the source, when it is received in sufficient sums to be beyond the exempt minimum, he is compelled to state under oath information that he is not obliged to give if he chooses to exercise his right of protection of the Fifth Amendment.

It is also interesting to note that any collector, deputy collector or employee of the United States may not divulge or make known in any manner whatever, the operation, the style of work or the property of the manufacturer or producer visited by him in the discharge of his official duties or the amount or sources of income, profits, losses or expenditures of any kind set forth or discussed in the income return. And for this offending, the government employee is punished by a fine or imprisonment. Rev. Stat. 3167, Revenue Act 1921, Sec. 1311, 42 Statutes 311, 313. By this Congress intended to protect the taxpayer in his business so that his secrets of business might not be divulged. But who would be served if this protection is accorded to the bootlegger or highwayman? Again assuming that he was entitled to deduction for ordinary and necessary expenses as provided in Sec. 214 of the Act of 1921, 42 Stat. 239, is it possible that the Government is to make allowances for expenses and loss sustained in this illegitimate trade? Assuming that bribery was a means of carrying on the trade, is

the government to make allowances for bribing its officials? And if the business flourishes, is the government to share in his prosperity? It is hard to conceive of Congress ever having had in mind that the government be paid a part of the income, gains or profits derived from successfully carrying on this crime or entering into a computation with the person engaged in this unlawful business to ascertain how and to what extent he shall be taxed. The criminal code provides punishment for those who violate the Volstead Act and its various provisions, and if severer punishment should be inflicted, it is a matter for Congress to legislate. It is incredible to believe that it was intended that a bootlegger be dignified as a taxpayer for his illegal profit so that the government may accept his money for governmental purposes as it accepts the money of the honest merchant taxpayer.

The Courts of Canada have considered the question under its income tax law and have held that its Parliament never intended to levy income tax on the proceeds of crime or gain derived from the business which cannot be carried on without violating its criminal law. They have pointed out that such a business should be strictly suppressed and that it would be strange indeed if, under such a statute, the Crown in right could levy a tax upon the proceeds of a business which its provincial legislature in the exercise of its constitutional powers has prohibited within the province. *Smith* v. *Minister of Finance,* 2 Dom. Law. Rep. (1925) 1137. We have said that an embezzler's moneys are not taxable under the income tax act. *Rau* v. *United States,* 260 F. 136. In *Emmerich* v. *United States,* 298 F.

5, an embezzler was convicted and in *Levin* v. *United States,* 5 F. (2d) 598, a bootlegger was convicted of making false returns by evading the proper income tax upon their respective incomes. In neither case does it appear that the question presented here was considered. Therefore I conclude that the reversal should also order the dismissal of the indictment.

○

DEC 31 19
WM. R. STAN

No. 395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

THE UNITED STATES OF AMERICA,

Plaintiff-in-Error,

v.

SOLOMON NOVECK,

Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR.

Statement.

The defendant-in-error accepts as correct and accurate the statement of the case which appears under the heading "Statement" on pages 2 and 3 of the brief on behalf of the United States.

Questions Presented.

Does Section 253 of the Revenue Act of 1918 (re-enacted as Section 253 of the Revenue Act of 1921) which makes it an offense wilfully to attempt in any manner to defeat or evade a tax, repeal, as to false tax returns, Section 125 of the Criminal Code which defines the crime of perjury? This question was decided in favor of the defendant-in-error below. It is the only question argued in the Government's brief.

However, defendant contends not only that the court below was correct in its ruling but also that the indictment is insufficient as a pleading under Section 125 of the Criminal Code, because the indictment does not state facts sufficient to constitute an offense, in that the oath alleged was not authorized or required by law and the assignments of perjury are based on immaterial matters (R., 5-6).

ARGUMENT.

I.

Section 253 of the Revenue Act of 1918 repealed Section 125 of the Criminal Code so far as applicable to perjury in connection with a tax return under that revenue act.

Section 253 of the Revenue Act of 1918 includes within its condemnation anyone

> "who wilfully attempts in any manner to defeat or evade the tax imposed by this title."

Clearly one who commits, in a jurat to an income tax return, the offense defined by Section 125 of the Criminal Code, falls within the purview of the above quoted portion of Section 253 of the Revenue Act of 1918. Perjury, in short, is one method—perhaps the most obvious method—of defeating or evading the tax, and a statutory provision which covers one who attempts "*in any manner*" to defeat or evade the tax, of necessity, includes the perjurer.

The Government, in its brief, attempts to refute that apparent import of the language by tracing the legislative history of the two statutes as indicative of Congressional intent. In this connection the *language* of the earlier revenue statutes is significant. Section 15 of the

Act of June 30, 1864 (c. 173, 13 Stat. 223, 226), which became Section 3179 of the Revised Statutes (3 Fed. Stat. Ann., 2nd Ed., p. 1009), is typical:

> "Whenever any person delivers or discloses to the collector or deputy any false or fraudulent report, return, account or statement, with intent to defeat or evade * * *."

Section 9 of the Revenue Act of July 1st, 1862 (c. 119, 12 Stat. 432, 435), was similarly phrased, as were also Section II-F of the Tariff and Revenue Act of October 3, 1913 (c. 16, 38 Stat. 114, 171), and Section 18 of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 775).

Those acts condemn one method of defeating or evading the tax, namely—the delivery or disclosure to the collector of any false or fraudulent return. In the Act of 1918, Congress extended its prohibition to *"any manner"* of defeating or evading the tax. By the adoption of this all-inclusive phraseology Congress clearly intended to embrace within the provision of Section 253 of the Revenue Act *all methods* of defeating or evading the income tax.

This was aptly summarized by Hough, C. J., speaking for the Circuit Court of Appeals of the Second Circuit in the first opinion in *Steinberg* v. *United States* (not reported but appended to the brief of the United States):

> "But our *holding* is that the Income Tax Act of 1921 by Sec. 253 has so far as indictments for perjury in tax returns under the statute are concerned repealed Sec. 125 Crim. Code.
>
> "It is another example of each department wanting its own little code. Section 125 is undoubtedly broad enough to cover a false oath made in a certificate (return) required by law; the section was R. S. 5392, and that came from earlier and not much changed acts which were applied to a case of false

swearing to an income tax return under the Act of 1864 (*United States* v. *Smith*, 1 Saw. 277, Fed. Cas. No. 16341).

"The various Income Tax laws passed since the 16th Constitutional Amendment, patterned what was Sec. 253 in 1922 after the model of 1864 until 1918; the characteristic thing about all of them being that specific punishment was allotted to the making of '*any false and fraudulent* return or statement (of income) with intent to defeat or evade.'

"The Acts of 1918 and 1921, perhaps amplify but certainly simplify this language, by saying that whoever defeats or evades '*in any manner*' is guilty. The phrase italicized undoubtedly includes a false and fraudulent manner; and if that falsity consisted in a false oath (required on a material matter) Sec. 253 prescribed a penalty for that particular perjury."

Moreover, the fact that Congress, in subsequent acts (Act of 1924, c. 234, Sec. 1017, 43 Stat. 253, 343; Act of 1926, c. 27, Sec. 1114, 44 Stat. 9, 116), while including Sec. 253 (in sub-division [b]), has, in an additional and closely associated provision (sub-division [c]), grouped "preparation" and "presentation" of the return in the disjunctive shows that Congress has not at all times had in mind the strict distinction, for which the Government argues, between the making and the filing of a return Nor do all the statutes which the Government summons to its aid support its contention in this regard.

Section 23 of the War Revenue Act of 1898 (c 448, 30 Stat. 448, 457), which the Government mentions at page 16 as part of the history of provisions against the filing of false returns, provides that "if any such manufacturer * * * shall *make* any false or untrue declaration * * *."

Similarly Section 35 of the Act of 1909 (c. 6, 36 Stat. 11, 111) cited at the top of page 17 of the Government's brief, condemns anyone "who shall knowingly *make* any

false statements or false entries." And in Section 210 of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 780), cited at page 17 of the Government's brief a provision relating to the estate tax reads "whoever knowingly *makes* any false statement in any notice or return required to be filed by this title * * *." Section 310 of the same act, relating to the munitions tax, cited at page 17 of the Government's brief, provides a punishment for anyone "who knowingly *makes* false statements in any return."

In short, it is impossible to spell out a consistent Congressional intention to differentiate between provisions relative to the making and provisions relative to the filing of tax returns. The recent statutory policy, on the other hand, would indicate an intention to segregate under the provisions of the Revenue Acts all methods of defeating or evading the taxes therein imposed and an intention, therefore, to repeal (by supplanting) Section 125 of the Criminal Code insofar as it relates to perjury in income tax returns.

The revenue acts since 1913 have become more and more all inclusive and complete codes upon the subject of income taxes. Not only are the rates and procedure provided for, but penalties, forfeitures and offenses with the punishments therefor are completely covered. From a reading of the Revenue Acts of 1918 and 1921 is it possible to reach any other conclusion than that Congress not only intended to, but did, cover the entire field?

The determining factor as to whether Section 253 repeals *pro tanto* Section 125 of the Criminal Code, is whether the perjury here charged amounted to an attempt to defeat or evade the tax. There is no doubt that it did. The very history of the law against evasions or attempted evasions cited by the Government indicates that even false entries were so regarded by Congress (Act of 1909, Section 35, supra). If the keeping of false records is an attempt certainly the swearing to a false return is a more elaborate attempt to evade.

This case would, therefore, seem to fall within the doctrine laid down in *United States* v. *Tynen* (1870), 78 U. S. 88; *United States* v. *Yuginovich* (1921), 256 U. S. 450, and *Grogan* v. *Walker & Son* (1922), 259 U. S. 80. *Morgan* v. *Devine* (1915), 237 U. S. 632, on which the Government places much reliance, is distinguishable. The two sections involved in that case were adjacent sections of the same act. It is extremely difficult to adjudge conflict between two acts or two sections of the same act passed on the same day; the minds of the legislators could hardly be said to have undergone so sudden a change. 21 Op. Att. Gen. 597 (McKenna, 1897); *Stubblefield* v. *Menzies* (Circ. Ct., D. Oreg., 1882), 11 Fed. 268.

On a re-hearing in the *Steinberg* case the Circuit Court of Appeals for the Second Circuit reversed its position upon "the rule that the crime of perjury in an affidavit is complete the moment the oath is taken with the necessary intent." *Steinberg* v. *United States* (1926), 14 Fed. 2nd 564.

The authorities upon which the court relied are almost entirely concerned with perjury at common law. The crime created by Sec. 125 of the Criminal Code and common law perjury are not identical. The making of a false affidavit is perjury at common law only when it is made in a judicial proceeding or court of justice. See *United States* v. *Bailey*, 9 Peters 238 (1835); *Wechsler* v. *United States* (C. C. A., 2nd Cir., 1907), 158 Fed. 579; *Hallock* v. *United States* (C. C. A., 8th Cir., 1911), 185 Fed. 417, 424; 1 *Hawkins' Pleas of the Crown*, Curw. ed., p. 429; 3 *Coke Institutes*, 164; 4 *Blackstone's Commentaries*, 137; 2 *Bishop Criminal Law*, 8th ed., 589. No such restriction is imposed by Sec. 125 of the Criminal Code, which may be said, for convenience of phraseology, to create the crime of false swearing as distinguished from the narrower one of common law perjury.

There can be no legal conviction, nor any valid judg-

ment upon conviction, unless the law creating the offence be at the time in existence. *United States* v. *Tynen* (supra).

II.

The matters as to which perjury is alleged in the indictment are immaterial.

By the words of Section 125 of the Criminal Code, perjury, as at common law, is committed (so far as it is here necessary to define it) by stating "any material matter which (the accused) does not believe to be true."

The matter alleged in the second count of the indictment as having been sworn to falsely by the defendant is as follows:

> "(1) certain matters, mainly that the amount of income tax due and owing by said S. Noveck & Co., Inc., to the United States for the year 1920 was $814.92; (2) and that the total net income from the business of S. Noveck & Co., Inc., received by the said S. Noveck & Co., Inc., amounted to $10,449.21."

These items are immaterial and form no essential part of an income tax return. They are mere mathematical conclusions resulting from the subtraction of deductions from the gross income and multiplying the difference by the rates prescribed. A return which showed merely the items of gross income and deductions could not be said to be an incomplete return, for the Internal Revenue officials could without more compute the amount of the tax. The items of net income and tax may be erroneously computed but they can never be false in the legal sense contemplated by the perjury section.

This question has arisen in the District Court for the Southern District of Florida, in *United States* v. *Demos*

(1923), 291 Fed. 104. There the indictment charged the defendant with wilfully attempting to defeat and evade the tax in that he filed a false and fraudulent return showing the amount of income tax due the United States to be $1,084.79, whereas it should have been $5,851.12. The same offense was also charged in an indictment drawn under Section 125 of the Criminal Code and Judge Call sustained demurrers to the indictments and granted motions to quash. In his opinion he said:

> "No. 1220 purports to charge the defendant with wilfully attempting to defeat and evade the tax imposed upon him by the act of Congress, in that he furnished the collector of internal revenue a false and fraudulent return in writing showing the amount of taxes due at $1,084.79, whereas it should have been $5,851.12.
>
> "No. 1221 purports to charge perjury committed in subscribing to the oath to the same tax return, in that the amount therein shown to be due was $1,084.79, when it should have been $5,851.12. A photostatic copy is made a part of the indictment. The oath subscribed, as shown by this paper, is as follows:
>
> 'I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me and to the best of my knowledge and belief is a true and complete return in good faith for the taxable period as stated.'
>
> "The charge of perjury is predicated on the amount of the tax due, computed according to the table on the return. Passing over the form of the oath, and admitting for the purpose of this discussion that the indictment sufficiently alleges the substance of the oath, the only charge of perjury is that the amount of the tax is not correct; that it is less than it should have been on the items contained in the return. No one of these items is questioned, nor is it alleged that

either item is false or fraudulent. To my mind the wording of the indictment conveys the meaning that, because the return contains the computation of the amount due, based upon the items of income, and this amount is too little, the items being admittedly correct, therefore perjury has been committed.

"(1) As I understand the law, perjury cannot be predicated upon such allegations. It seems to me that the indictment must point out some material fact sworn to, which is false within the knowledge of the defendant, or some fact affirmed by the defendant, which he does not believe to be true. For this reason I do not think the indictment charges an offense. The demurrer will therefore be sustained, and the motion to quash granted.

"(2) What I have said above applies equally to the indictment in case No. 1220, and in addition it is very questionable whether Congress intended by the Act of February, 1919, to cover the making of a false and fraudulent return, which act was already punished by a prior act. But, be that as it may, an indictment to allege either offense must contain charges showing the false and fraudulent character of the return, or statement in writing, other than a mere charge that the return or statement was 'false and fraudulent.' It is not enough to say that it is false and fraudulent. It must be stated wherein it is false and fraudulent. This is necessary, both to put the defendant on notice of what he is charged and also to protect him from a subsequent prosecution for the same offense. This the indictment does not do, by simply alleging that the amount of tax computed is too little.

"The demurrer to the indictment in this case (No. 1220) will also be sustained, and the motion to quash granted."

The only difference between the case at bar and the *Demos* case is that the indictment there alleged false

swearing only as to the amount of the tax due, while here the indictment alleges false swearing as to the net income of the corporation as well as to the amount of the tax due to the United States. That in no way cures the insufficiency of the indictment, for the same reasoning applies with equal force.

Section 239 of the Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1081) prescribes the material matters to be incorporated in corporate tax returns, as follows:

> "That every corporation subject to taxation under this title and every personal service corporation shall make a return stating specifically the items of its gross income and the deductions and credits allowed under this title. The return shall be sworn to by the president, vice-president or other principal officer and by the treasurer or assistant treasurer."

That section is explicit; it sets forth in precise terms just what items in the income tax return must be sworn to by the officers of the corporation. The items alleged in this indictment to have been falsely sworn to—those of net income and amount of tax—are not enumerated in that section. It is obvious that these items do not come within the purview of the statute and did not constitute matters which the law regards as material.

Conclusion.

It is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, December 24, 1926.

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